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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

G. THOMAS CESTARO,

Petitioner,

vs.

JAMES CORCORAN,

Respondent.

TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether or not a licensee is entitled, under the Fourteenth Amendment to the United States Constitution, to confront and to cross-examine adverse witnesses in a disciplinary hearing in which factual determinations are made, resulting in a decision to revoke the petitioner's license?

2. Whether or not due process is satisfied where a licensee is excluded from the hearing room and adverse testimony elicited therein is later incorporated into the hearing transcript, over defense counsel's objection, and where an offer is made by the hearing officer allowing petitioner to recall adverse witnesses at a later date at the agencies' expense, for purposes of cross-examination?

3. Whether or not procedural infirmities reach Constitutional proportions and mandate reversal of a determination where adverse testimony is elicited at a fact finding hearing, which goes to the heart of the issues determining revocation of a license, without the availability of timely cross-examination?

PARTIES

The petitioner in both the Supreme Court of the State of New York, Appellate Division, First Department and the New York State Court of Appeals was G. Thomas Cestaro. The respondent in both Courts was James Corcoran, Superintendent of Insurance of the State of New York.

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TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

G. Thomas Cestaro petitions this Court to issue a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department (hereinafter Appellate Division), to review the decision of that Court confirming the respondent's determination to revoke petitioner's insurance brokers license after a hearing.

OPINIONS BELOW

On July 24, 1984, respondent concurred in the findings of fact, conclusion and decision to revoke petitioner's insurance brokers license (Appendix A, infra, A-17-A-30)

On December 12, 1985 the Appellate Division confirmed the determination of the respondent James Corcoran, without opinion. (Appendix, infra, A-31) The memorandum decision is reported at 496 N.Y.S.2d 595.

On February 6, 1986, the New York State Court of Appeals denied petitioner's application for leave to appeal. (Appendix, infra, A-32)

JURISDICTIONAL STATEMENT

This petition seeks review of a decision of the Appellate Division, made and entered on December 12, 1985. An application for leave to appeal to the New York State Court of Appeals was denied on February 6, 1986. The present petition was filed with this Court within ninety days of that date.

The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution states, in pertinent part, as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law . . ."

2. § 119 of the New York State Insurance Law, effective at the time the administrative action was commenced against petitioner, provided, in pertinent part:

"7. Every broker's license issued pursuant to this Section shall be for a term expiring on the thirty-first day of October next following the date of its issuance, and may be renewed for the following period of twenty-four months upon the filing of an application in conformity with subsection four. . . . Before refusing to renew any such license except on the ground of failure to pass a written examination required pursuant to subsection five, the superintendent shall notify the applicant of his intention so to do and shall give such applicant a hearing. . . ."

"9. The superintendent may refuse to renew or suspend any insurance broker's license if, after notice and a hearing, he determines that the licensee, or any sub-licensee named in such license: . . . (c) has been guilty of fraudulent or dishonest practices . . ."

3. § 23 of the New York State Insurance Law effective at the time the administrative action was commenced against petitioner, provided, in pertinent part:

"Whenever by the provisions of this Chapter the superintendent is required to give any person a hearing on any proposed action, it shall be sufficient compliance . . . [that] Every person affected . . . be allowed to be present during the giving of all the testimony, and shall be allowed a reasonable opportunity to inspect adverse documents, to examine and cross-examine witnesses and to present proof in support of his interest."

STATEMENT OF THE CASE

Petitioner filed a complaint in the Supreme Court of the State of New York, New York County, seeking to review an administrative determination, after a hearing, made by respondent, as Superintendent of Insurance of the State of New York, to revoke petitioner's insurance brokers license. (Appendix, infra, Findings of Fact, Conclusion and Decision, A-17-A-30) Pursuant to § 7804 (g) of the New York Civil Practice Law and Rules (CPLR), the action was transferred to the Supreme Court, Appellate Division, First Judicial Department for hearing and determination in the first instance. After considering the submission of briefs from both sides and hearing oral argument, the Appellate Division confirmed the Respondent's determination, without opinion. Petitioner sought leave to appeal to the New York State Court of Appeals, which was denied on February 6, 1986.

This petition asks this Court to review the Appellate Division's decision, confirming the respondent's action below. Petitioner contends that this case presents unresolved issues of law that are of nationwide significance in that they impact upon the activities of regulatory government agencies in all fifty states, upon a substantial segment of the nation's gainfully employed population and upon all persons with a property interest in continued

employment. Additionally, petitioner contends that, where, as here, violations of fundamental procedural Due Process rights have been upheld and/or left undisturbed by a state's appellate Courts, review by this Court is appropriate.

Petitioner timely objected to the proposed introduction of the adverse testimony elicited at the prior hearing, during his absence, on the first day that his hearing commenced, immediately after the attorney for the insurance department moved for incorporation. The hearing officer overruled the objection and allowed the prior testimony, encompassing approximately 700 transcript pages, to be incorporated. The hearing officer untimely offered that petitioner could recall those witnesses at department expense if he wished to cross-examine them on the basis of the adverse testimony elicited approximately two months previously.

Petitioner properly raised the issue before the Appellate Division. Point I of petitioner's argument in his brief to the Appellate Division was captioned:

"PETITIONER'S FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS OF LAW WERE VIOLATED.

A. PETITIONER WAS DENIED HIS RIGHT TO CONFRONT AND TO CROSS-EXAMINE THE WITNESSES AGAINST HIM BY THE INCORPORATION INTO THE RECORD OF THE TESTIMONY ELICITED AT THE PRIOR PROCEEDING AND USED BY THE DEPARTMENT IN FORMULATING ITS DECISION"

The issue was again advanced and formed the sole basis for petitioner's application for leave to appeal to the New York State Court of Appeals. The Court of Appeals denied the application for leave to appeal on February 6, 1986.

STATEMENT OF FACTS

The respondent herein, James Corcoran, as Superintendent of Insurance, initiated actions and caused two separate proceedings to commence, as follows: The first was a summary suspension action directed against an insurance brokerage entity known as Omnibus Brokerage Incorporated (Omnibus) and against Bruce S. Horowitz (Horowitz), an individual licensed as an insurance broker. The first action was based upon specific allegations of improper conduct employed by Omnibus and by Horowitz in insurance dealings. The second proceeding, which was to be heard at a later time, was a hearing on a Citation alleging certain misconduct by the same two aforesaid parties and also by the petitioner herein. (Citation-Appendix, infra A-1-A-16) The first action was summary in nature. The two named parties, Omnibus and Horowitz, demanded a hearing for relief from the summary suspension order.

In *January and February of 1984* a hearing was held in response to the Omnibus-Horowitz demand. The petitioner appeared at the hearing only as a potential non-party witness for Omnibus and for Horowitz. At the specific instance and demand of the department's prosecuting attorney and upon the hearing officer's command, all non-party witnesses, including the petitioner, were excluded from the hearing room. The summary suspension hearing generated adverse testimony and substantial evidence encompassing approximately 700 pages of transcript. The petitioner herein was not called by either side as a witness in that proceeding but testimony was elicited from other witnesses that tended to implicate him adversely.

In *April of 1984*, some two months later, the second proceeding, namely the Citation hearing, took place. At that time the petitioner was a named party, and over the specific objections of his attorney, the aforementioned external transcript was admitted into evidence by the hearing officer and incorporated into the new transcript. However, the hearing officer did offer to allow the petitioner to recall all prior adverse witnesses at that later time. Additionally, the hearing officer offered to permit the deferred examination of the adverse witnesses at the insurance department's expense. The hearing officer made the aforementioned

offers after some two months had elapsed since the adverse testimony had been elicited. It is submitted that there was apparent substantial likelihood that the witnesses' memories were clouded by the passage of time. Additionally, a strong possibility existed that potential testimony obtained upon the deferred recall of the witnesses would be tainted as unduly influenced by extrinsic forces. The petitioner's counsel rejected the hearing officer's offers.

It is petitioner's contention that the hearing officer's determination that he was guilty of improper practices, was based upon the strength of adverse testimonial evidence which had not been tested for truth by timely and reliable cross-examination, in accordance with established federal Due Process standards. Petitioner further contends that he was substantially prejudiced by the earlier adverse testimonial evidence and that the Superintendent's determination should be reversed for the respondent's failure to provide petitioner with Due Process protections in accordance with the United States Constitution including, but not limited to, proper notice of a hearing where adverse testimony would be elicited that would later be used against him.

REASONS FOR GRANTING REVIEW

1. THIS COURT SHOULD GRANT CERTIORARI AS VIOLATIONS OF FUNDAMENTAL PROCEDURAL DUE PROCESS RIGHTS HAVE BEEN UPHELD AND/OR LEFT UNDISTURBED BY A STATE'S APPELLATE COURTS.

Petitioner contends that the decision of the Appellate Division, which confirmed the determination of the respondent to revoke petitioner's insurance brokers license, sanctioned respondent's violation of petitioner's Fourteenth Amendment rights. Additionally, the New York State Court of Appeals, which denied petitioner's application for leave to appeal, while concededly not making a determination on the merits, left undisturbed the respondent's violation of petitioner's Constitutionally protected rights. Under such circumstances, it is submitted that review by this Court is appropriate.

§ 119 of the New York State Insurance Law, effective at the time the administrative action was commenced against petitioner, provided, in pertinent part:

"7. Every broker's license issued pursuant to this Section shall be for a term expiring on the thirty-first day of October next following the date of its issuance, and may be renewed for the following period of twenty-four months upon the filing of an application in conformity with subsection four. . . . Before refusing to renew any such license except on the ground of failure to pass a written examination required pursuant to subsection five, the superintendent shall notify the applicant of his intention so to do and shall give such applicant a hearing. ..."

"9. The superintendent may refuse to renew or suspend any insurance broker's license if, after notice and a hearing, he determines that the licensee, or any sub-licensee named in such license: . . . (c) has been guilty of fraudulent or dishonest practices . . ."

This Court has repeatedly held that liberty and property interests, created by an independent source such as state law, may not be revoked, extinguished or terminated in the absence of procedures consistent with the Due Process Clause of the United States Constitution. *Board of Regents v. Roth*, 408 U.S. 564, 576-578, *Logan v. Zimmerman Brush Co, et. al.*, 455 U.S. 422, *Reagan v. United States*, 182 U.S. 419, *Cleveland Board of Education v. Loudermill*, 470 U.S. ____, 84 L.2d 494 (1985).

In *Cleveland Board of Education v. Loudermill*, 470 U.S. ____, 89 L.Ed 2d 494, this Court found that respondent Loudermill, a tenured public school teacher, had a Constitutionally protected property interest in continued employment. The teaching position was created by an Ohio civil service statute which allowed for an employee's discharge for cause only.

In the within case, petitioner, licensed as an insurance broker since the year 1961, a period of 23 years, had a Constitutionally protected property interest in continued licensing as an insurance broker, a property interest at least equal to that of the tenured

public school teacher in Loudermill. New York Insurance Law § 119 specifically provides that the Superintendent of insurance may refuse to renew or may revoke an insurance broker's license only for cause. (e.g. See *Barry v. Barchi*, 443 U.S. 55, 64, 65 [Respondent there had a Constitutionally protected property interest in a horse trainer's license since under New York state law it could be suspended only upon a showing of cause.] Here, as in *Barchi*, a showing of cause was required for suspension or revocation of a license signifying a property interest.

The right to continue to engage in an occupation such as insurance brokerage, implicates a property right under the Fourteenth Amendment to the United States Constitution, *Board of Regents v. Roth*, 408 U.S. 564, *Tomanio v. Board of Regents*, 603 F.2d 255 (2nd Cir. 1979), rev'd on other grounds *Board of Regents v. Tomanio* 446 U.S. 478, and may also implicate a Constitutionally protected liberty interest. *Meyer v. Nebraska*, 262 U.S. 390, 399. A license is a species of property protected under the Fourteenth Amendment to the United States Constitution. *Bell v. Burson*, 402 U.S. 535, *Mackey v. Montrym*, 443 U.S. 1, 10, 11, *Barry et. al. v. Barchi*, 443 U.S. 55.

Once it is accepted that petitioner has a Constitutionally protected property interest, in continued licensing as an insurance broker, the issues focus upon what quality, quantum, timeliness or manner of process was due him before the State insurance agency could deprive him of that property interest, in conformity with the Due Process Clause of the United States Constitution. *Greene v. McElroy*, 360 U.S. 474, *Willner v. Committee on Character and Fitness*, 373 U.S. 96, *Memphis Light, Gas and Water Division et. al. v. Craft, et. al.*, 436 U.S. 1, 9, *Board of Regents v. Roth*, 408 U.S. 564, 577; *Perry v. Sindermann*, 408 U.S. 593, 602; *Cleveland Board of Education v. Loudermill*, 470 U.S. ____, 84 L Ed. 2d 494.

"An essential principle of due process is that a deprivation of life, liberty or property be preceded by notice and a hearing appropriate to the nature of the case"– *Cleveland Board of Education v. Loudermill*, 84 L. Ed 2d at 503, citing *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

In *Cleveland Board of Education v. Loudermill*, the state civil service statute provided substantive protection against discharge for cause but failed to provide indicia of what process is due. Loudermill had not been afforded a pre-termination hearing prior to discharge. This Court, applying the balancing test first enunciated in *Mathews v. Eldridge*, 424 U.S. 319, considered the significance of the private interest involved, the interest of granting a prompt hearing where the employee is able to present his side, and the governmental interest in following alternate procedures. The Court balanced the interests, including the severity of depriving a person of a means of livelihood and the fact that dismissals for cause often involve factual disputes with the employee's interest in avoiding immediate termination at odds with the government interests. This Court concluded that the aforementioned private interests outweighed the governmental interests in immediate termination.

In the within action, petitioner had a significant private interest in continued licensing as an insurance broker, in the pursuit of his livelihood. He had an equally significant interest in being present when adverse testimony was elicited and in being able to confront and to cross examine adverse witnesses at the time that their testimony was given, in order to protect his continued licensing. The New York state legislature, in mandating the hearing procedures to be followed and by placing restrictions on the Superintendent's power to revoke an insurance broker's license, recognized the importance of the private interests involved. Appropriately, the requirement that procedures such as the right to confront and to cross examine adverse witnesses, were included in the legislation as a safeguard. The legislature's specification regarding procedural protections is indicative of their recognition of the fundamental premise that, under the Due Process clause of the Fourteenth Amendment, an individual has the right to confront and to cross-examine adverse witnesses whose testimony would tend to deprive him of his livelihood.

In *Greene v. McElroy*, 360 U.S. 474 (1959) this Court held that the Secretary of the Armed Forces was not authorized to deprive petitioner of his employment in a proceeding in which he was not afforded the safeguards of confrontation and of cross-examination. In *Greene*, the Secretary of the Armed Forces revoked petitioner's security clearance based upon an investigative summary. The Court observed:

> "Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual and the reasonableness of the action depends on fact findings, the evidence to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. They have ancient roots. They find expression in the Sixth Amendment which provides that in all criminal cases the accused shall enjoy the right to be confronted with the witnesses against him. The Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases but also in all types of cases where administrative and regulatory actions were under scrutiny. Nor, as it has been pointed out, has Congress ignored these fundamental requirements in enacting regulatory legislation".—Id. at 496, 497 (citations omitted)

In *Willner v. Committee on Character and Fitness*, 373 U.S. 96 (1963), this Court confronted the issue of what procedural protections are required to withhold a license to practice law. This

Court held that petitioner was entitled to confront and to cross-examine individuals who made complaints to the Character Committee that were adverse to his interests. In reversing the determination of the New York State Court of Appeals, upholding the determination of the character committee denying the applicant admission to the bar, this Court held that the Committee was required to provide the petitioner with the right to confront and to cross examine the witnesses against him.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. ____, 4 L. Ed. 2d 494, Justice Marshall, delivering a separate opinion, observed that:

> "I write separately, however, to reaffirm my belief that public employees who may be discharged only for cause are entitled, under the Due Process Clause of the Fourteenth Amendment, to more than respondents sought in this case. I continue to believe that before the decision is made to terminate an employee's wages, the employee is entitled to an opportunity to test the strength of the evidence by confronting and cross-examining adverse witnesses and by presenting witnesses on their own behalf, whenever there are substantial disputes in testimonial evidence."—84 L. Ed. 2d at 508.

II. THIS COURT SHOULD GRANT CERTIORARI DUE TO THE BROAD SCOPE UPON WHICH THE ISSUES PRESENTED IN THIS CASE IMPACT UPON THE RIGHTS AND OBLIGATIONS OF STATE LICENSEES AND UPON GOVERNMENTAL AGENCIES IN ALL FIFTY STATES AND BECAUSE THE ISSUES PRESENTED HERE CONFRONT SIGNIFICANT UNRESOLVED ISSUES OF CONSTITUTIONAL LAW.

This Court has granted Certiorari in cases where there were important questions involving federal administrators and employees (*Service v. Dulles*, 354 U.S. 363,) and where there were

important Constitutional questions involving the operation of municipal utilities throughout the nation. *Memphis Light, Gas & Water Division v. Craft,* 436 U.S. 1.

In *Service v. Dulles,* 354 U.S. 363, this Court held that where the Secretary of State's statutory authorization to discharge a foreign service officer was restricted by regulations, the Secretary's action in discharging the employee, in violation of the regulations, rendered the discharge illegal.

In *Memphis Gas & Water Division v. Craft,* 436 U.S. 1, this Court held that the public utility, who could only terminate service for cause, under state law, was required, under the Due Process Clause of the United States Constitution, to provide the consumer with notice, informing the customer not only of the possibility of termination, but also of a procedure for challenging a disputed bill.

The within case presents issues of notice and confrontation involving what quality, quantum, timeliness or manner of process is Constitutionally due to a licensee in a disciplinary hearing where adverse testimonial evidence is taken. It is submitted that the issues here are as significant as those presented in *Service* and *Memphis.* "While the legislature may confer an interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest without appropriate procedural safeguards." *Cleveland Board of Education v. Loudermill,* 470 U.S. ____, 84 L. Ed 494 at 503. Additionally, it is submitted that the Constitutional deprivation here was at least equal to that in *Loudermill.*

"Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests in the licensees. In such cases the licenses are not to be taken away without the procedural due process required by the Fourteenth Amendment." *Bell v. Burson,* 402 U.S. at 539, citing *Sniadach v. Family Finance,* 395 U.S. 337; *Goldberg v. Kelly,* 397 U.S. 254. In the instant case, as in *Bell,* petitioner's license should not have been taken away in the absence of the procedural Due Process required by the Fourteenth Amendment.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. ____, 84 L. Ed. 2d 494, the majority opinion did not confront the issue of whether the respondent was entitled to confront and to cross examine adverse witnesses and to challenge the government's proof since the Court determined that, as a matter of Due Process, a pre-termination hearing was Constitutionally required and the procedure followed below was infirm. Justice Marshall, writing separately, set forth his view that the respondents were entitled to more procedural protections than they had requested in that they should have been given the opportunity to confront and to cross examine the witnesses presenting proof adverse to their interests.

The question of what process is due aggrieved individuals in their dealings with agencies of the government is one of federal Constitutional Law. *Arnett v. Kennedy*, 416 US. 134, 167, (Powell, J, concurring in part and concurring in result); *Vitek v. Jones*, 445 U.S. at 490-491; *Logan v. Zimmerman Brush Company*, 455 U.S. 422, 432; *Cleveland Board of Education v. Loudermill*, 470 U.S. ____, 84 L Ed. 2d 503. Twenty seven states, including the State of New York have adopted uniform statutes (under the Uniform State Administrative Procedure Act) which recognize and embody the Constitutional right of individuals in contested cases, such as the instant case, to confront and to cross-examine adverse witnesses against them.[1] Twenty-three states have not adopted uniform standards and the instant case affords this Court an opportunity to provide guidance to those twenty-three states and to clarify and to define the constitutional standard applicable herein for all fifty states.

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[1] Source: *Uniform Laws Annotated*, Master Edition, Vol. 13, Foundation Press, Mineola, New York, 1980, p. 357.

Arkansas Statutes, § 5-709 (e)
Connecticut General Statutes Annotated, § 4-178 (3)
District of Columbia Code Annotated, § 1-1509 (b)
Georgia Code, § 50-13-15 (3)
Hawaii Revised Statutes, § 91-10 (3)
Idaho Code, § 67-5210 (3)
Illinois Revised Statutes and Smith-Hurd Illinois

(Footnote Continued)

In *Scott et. al v. Department of Commerce and Community Affairs*, 84 Ill.2d 42, 48 Ill.Dec. 560, 416 N.E. 2d 1082 (1981) the Supreme Court of Illinois held that under the State Administrative Procedure Act, the agency had the obligation to call witnesses and to introduce proof on the statement of charges. Additionally, the Court held that the right to cross-examination is meaningless unless there are witnesses and there is testimony presented by the agency at the hearing. In the instant case the petitioner's delayed opportunity to confront and to cross-examine the witnesses against him some two months later was meaningless and made a mockery of fundamental Due Process protections guaranteed by the United States Constitution where the witnesses and the testimony were not produced by the agency at the petitioner's disciplinary hearing. Here, as in *Scott*, the agency had the obligation to call the witnesses so that they could be cross-examined in a meaningful manner. Instead, the hearing officer improperly shifted the burden of proof to the petitioner, in violation of his Constitutional rights.

(Footnote Continued)

Annotated, Chapter 127, Para. 1012, § 12 (b)
Iowa Code Annotated, § 17A.15 (3)
Louisiana Statutes Annotated, § 49:955 (C)
5 Maine Revised Statutes Annotated, § 9057 (4), (5)
Michigan Compiled Laws Annotated, § 24.272 (3)
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Montana Code Annotated, § 2-4-612 (5)
Nebraska Revised Code, § 84-914 (4)
Nevada Revised Statutes, § 223B.123 (4)
New Hampshire Revised Statutes Annotated, § 541-A:18 (IV)
McKinney's State Administrative Procedure Act, § 306 (3), § 23 of the New York Insurance Law
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3 Vermont Statutes Annotated § 810 (3)
Washington Revised Code Title 34, 34.04.100 (3)
West Virginia Code § 29A-5-3
Wisconsin Statutes Annotated, § 227.08 (6)
Wyoming Statutes Annotated, § 16-3-108 (c)

In *Pacific Molasses Company v. Federal Trade Commission*, 356 F.2d 386 (Cir. 5 1966) the Court held that the Commission's offer to allow the petitioners a continuance after it presented its case, so that the petitioners could prepare a defense and could recall witnesses for cross-examination, did not comport with Due Process of Law. Accordingly, the Commissioner's determination was reversed due to the violation of petitioners' Due Process rights and the fact that the petitioners were prejudiced therefrom. Here, as in *Pacific*, the agencies' determination should be reversed, due to the violation of rights and the ensuing prejudice.

Similarly, in *Town of Somerset, et al., v. Montgomery County Board of Appeals*, 245 Md. 52, 225 A.2d 294, the Court of Appeals of Maryland observed that:

> "The right of a party to call hostile witnesses as its own after the testimony of the adverse witness has been completed, in our opinion, is not the substantial equivalent of the right to cross-examine after the direct testimony of the witness has been concluded. The techniques of advocacy so essential to our system of justice are largely stultified when resort must be had to such a cumbersome and delayed substitute for immediate and direct cross-examination."

In the instant case, the hearing officer offered to permit the recall of the adverse witnesses who had testified at the prior hearing, in petitioner's absence. Some two months had elapsed from the time of the initial hearing and any cross-examination of the adverse witnesses at the later hearing would have been ineffective in altering the impressions that were made upon the hearing officer in observing the demeanor of the witnesses at the time of the initial hearing without their testimony withstanding a timely and reliable test for truth. Here, as in *Town of Somerset*, justice was stultified by the hearing officer's offer of a delayed substitute for immediate and direct cross-examination.

As Professor Wigmore observed in his treatise on evidence:

> ". . . the cross-examination immediately succeeds in time the direct examination. In this way the modification or the discredit produced by the facts extracted is more readily perceived by the tribunal. No interval of time elapses to diminish or conceal their force."
>
> Since the purpose of this immediate sequence is to furnish the tribunal with the means of fixing the net significance of the witness' testimony while the tenor of his direct testimony is fresh in their minds, it seems proper enough to hold that the opponent is entitled to this immediate sequence, in order to expose without delay the weak points of the testimony against him."—6 Wigmore, Evidence, Section 1884 (3rd Ed.)

It is submitted that the tribunal in the instant case was willingly deprived of the means of fixing the net significance of the witnesses' testimony and the hearing officer's determination was fatally flawed thereby.

In *Pacific Molasses Company v. Federal Trade Commission*, 356 F.2d 386 (Cir. 5 1966), the Court found it unnecessary to reach the appellant's contention that the violation of Constitutionally protected procedures, mandates reversal irrespective of whether prejudice has been shown. It is submitted that in the instant case substantial prejudice inured to the petitioner resulting from improperly admitted adverse testimonial evidence but that whether or not prejudice was shown should not impact upon whether or not the determination should be annulled because of the egregious violation of Constitutionally protected procedures.

In *Appeal of Kelleher*, 469 A. 2d 1322 (Supreme Court of New Hampshire), the Court held *inter alia* that the petitioner was deprived of the right to confront and to cross-examine the witnesses against him, in violation of his Due Process rights and that the determination had to be annulled even though the evidence presented in the joint petition was sufficient to sustain

the conclusion reached by the agency. It is submitted that in the instant case the determination should have been annulled irrespective of whether or not the properly admitted later evidence met the substantial evidence test as the violation of rights reached Constitutional proportions.

In *Laman v. Nevada Real Estate Advisory Commission*, 589 P. 2d 166 (Supreme Court of Nevada 1979) the Court held *inter alia* that while petitioner was deprived of the right to confront and to cross-examine the witnesses whose affidavits were admitted against her, in violation of federal Due Process rights, the determination of the agency would nevertheless be upheld since there was ample additional evidence to support the result.

It is submitted that it is unresolved by this Court as to whether or not a violation of fundamental federal Due Process rights mandates reversal of a state administrative determination or whether the administrative determination may be upheld if there is ample additional evidence to support the result, apart from that evidence admitted in violation of petitioner's Due Process rights. This Court has held in other contexts that where the petitioner has established the violation of a Due Process right, it is irrelevant that the same result would have been reached if Constitutionally sufficient procedures were followed. *Brookhart v. Janis*, 384 U.S. 1; *Coe v. Armor Fertilizer Works*, 237 U.S. 413. This unresolved issue of Constitutional law, inconsistently interpreted by Courts of judicial review in various states, has a broad application to administrative agencies, to individuals and to Courts charged with the responsibility of overseeing agency conduct and it is submitted that this Court should grant Certiorari here, for the reasons above stated.

CONCLUSION

Petitioner respectfully urges that this Court grant the petition and issue a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, First Judicial Department, to review the judgment of that Court entered against him.

Respectfully submitted,

G. THOMAS CESTARO
Petitioner, Pro-Se
653 Old Country Road
Westbury, New York 11590
(516) 333-4810

APPENDIX

APPENDIX

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State of New York
Insurance Department
Two World Trade Center
New York 10047

James P. Corcoran
Superintendent of Insurance

Martin Minkowitz
Deputy Superintendent
and General Counsel

In the Matter of the Applications and/or Licenses of BRUCE S. HOROWITZ individually and as sublicensee of OMNIBUS BROKERAGE, OMNIBUS BROKERAGE, INC. and G. THOMAS CESTARO Respondents	CITATION

TO THE ABOVE NAMED RESPONDENT:

PLEASE TAKE NOTICE THAT you are hereby cited to appear at a hearing to be held at the office of the New York State Insurance Department, No. 2 World Trade Center, 26th floor, New York, New York, on the 18th day of January 1984 at

10:00 AM to show cause why all licenses issued and/or applications for licenses pending, pursuant to the Insurance Law, should not be denied, suspended or revoked by reason of the following charges and specifications:

CHARGE I

RESPONDENTS HAVE DEMONSTRATED THEIR UNTRUSTWORTHINESS AND/OR INCOMPETENCY TO ACT AS INSURANCE BROKERS AND AGENTS WITHIN THE CONTEMPLATION OF THE INSURANCE LAW.

Specification A

1. During the period May 1983 through August 1983, respondents issued purported insurance identification cards in the names of Universal Underwriters Insurance Company and the North River Insurance Company.

2. Respondents had no authority to issue such purported cards.

3. Respondents failed to secure insurance on behalf of the persons to whom said purported cards were issued.

4. Respondents failed to advise the persons to whom said purported cards were issued respondents lacked authority to issue said cards.

Specification B

Items 1, 2, 3, and 4 of specification A are realleged with the same force and effect as if more fully set forth herein.

5. Respondents caused the persons to whom the purported identification cards were issued to complete insurance applications.

6. Respondent collected, from persons to whom the purported identification cards were issued, deposits on account of insurance to be obtained.

7. Respondents failed to account for the funds collected and failed to for-

ward the applications to any insurers.

Specification C

1. On or about June 15, 1983 through August 1983, respondents subproduced business through Sport Brokerage, Inc.

2. Respondents were given Sport Brokerage Inc.'s presigned Identification cards to be issued on behalf of Underwriters Insurance Company and North River Insurance Company.

3. Respondents issued said cards, collected premium funds and caused proposed insureds to complete applications therefore.

4. These funds and applications were never submitted to Sport Brokerage, Inc. or to any insurance carrier.

5. The persons purportedly insured did not receive policies nor were the deposits collected from them accounted for.

Specification D

1. Respondents' records indicate that the previous broker wrote to Lumbermen's Mutual Insurance Company on behalf of any insured, Helen Dianni, requesting reinstatement of her policy, which had been cancelled for nonpayment of premium.

2. Respondents' records indicate that the previous broker claimed the premium funds had been received by them.

3. Respondents' records indicate that on or about October 13, 1982 the carrier refused to reinstate the policy because adequate proof was not given that payment had been properly made to respondents' predecessor.

4. Respondents failed and neglected to advise Helen Dianni that Lumbermen's had refused reinstatement.

5. In November 1982, respondents accepted premium funds from the insured, Helen Dianni, and issued her a purported

identification card.

6. The respondents' actions, as listed above, misrepresented to the insured that her policy was in effect when they knew it had been cancelled.

7. Respondents failed to properly account for the funds collected from Helen Dianni as aforesaid.

8. Respondents failed to advise Ms Dianni that the insurance company disputes the effectiveness of coverage.

Specification E

1. The Specification A through E are realleged with the same force and effect as if more fully stated herein.

2. Respondent G. Thomas Cestaro, knew or should have known of the activities of Omnibus and Bruce Horowitz, as described herein above, by virtue of his business relationship to said respondents.

3. G. Thomas Cestaro failed and neglected to advise the Insurance Department of

the activities aforesaid.

CHARGE II

RESPONDENTS ARE GUILTY OF FRAUDULENT AND/OR DISHONEST PRACTICE IN VIOLATION OF SECTIONS 117 AND 119 OF THE INSURANCE LAW.

Specification A

The Specification A through E of Charges I are realleged with the same force and effect as if more fully set forth herein.

CHARGES III

RESPONDENTS HAVE VIOLATED SECTION 125 OF THE INSURANCE LAW BY FAILING TO FULFILL THEIR FIDUCIARY RESPONSIBILITY.

Specification A

The Specifications B through E of Charge I are realleged with the same force and effect as if more fully set forth herein.

CHARGE IV

RESPONDENT G. THOMAS CESTARO VIOLATED SECTION 38-D OF THE INSURANCE LAW.

Specification A

1. The Specifications A through E of Charges I are realleged with the same force and effect as if more fully set forth herein.

2. Respondent, G. Thomas Cestaro failed and neglected to report the foregoing activities to the insurance frauds bureau.

PLEASE TAKE FURTHER NOTICE THAT:

1. According to the records of the Insurance Department, the Respondents are presently licensed as insurance agents and brokers under Sections 113 and 119 of the Insurance Law.

2. This citation is issued to you pursuant to the provisions of Sections 117 and/or 119 of the Insurance Law.

3. Notice of this hearing is given to you in accordance with Sections 22, 23 and 117 and/or 119 of the Insurance Law.

4. Your attention is directed to a statement in plain language attached hereto, entitled "Hearing Procedures," summarizing the provisions of Insurance Department Regulation No. 97 (11 NYCRR 4). This statement contains important procedures and should be read carefully. A copy of Regulation No. 97 will be furnished upon request.

Dated: New York, N. Y.
January 4, 1984

Yours, etc.
James P. Corcoran
Super. of Ins.

By:
S/Virginia D. Mallon
Attorney
Office of General
Counsel

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

G. Thomas Cestaro
41-41 220 Street
Bayside, New York 11361

G. Thomas Cestaro, President
Creative Financial Network, Inc.
11 Old Country Road
Westbury, New York 11590

G. Thomas Cestaro, President
Bargain Insurance Brokerage, Inc.
653 Old Country Road
Westbury, New York 11590

G. Thomas Cestaro
11 Old Country Road
Westbury, New York 11590

Omnibus Brokerage, Inc.
1797 Veterans Highway
Central Islip, New York 11722

Bruce S. Horowitz
312 Anchorage Drive
Woodbury, New York 11797

Bruce S. Horowitz, President
Omnibus Brokerage
11 Old Country Road
Westbury, New York 11590

Omnibus Brokerage, Inc.
11 Old Country Road
Westbury, New York 11590

Omnibus Brokerage, Inc.
33 Commack Loop
Ronkonkoma, New York 11779

Omnibus Brokerage, Inc.
2936 Avenue R
Brooklyn, New York 11229

Omnibus Brokerage, Inc.
118-06 Northern Boulevard
Flushing, New York 11351

State of New York
Insurance Department
Two World Trade Center
New York 10047

HEARING PROCEDURES FOR PROCEEDINGS AGAINST LICENSES

(Summary of Procedures for Adjudicatory Proceedings Set Forth in Department Regulation No. 97 as Required by Section 301 (3) of the State Administrative Procedure Act)

1. The Hearing will be held before an impartial presiding officer.

2. You must be ready, and prepared with all of your evidence, to present your case on the hearing date.

3. You may be represented by an attorney at the hearing.

4. You may file a written answer to the Citation. If you do so, it should be mailed or hand delivered at least two days before the hearing date, addressed to the Department attorney who signed the Cita-

tion. You will have a full opportunity at the hearing to dispute or explain any charges made against you in the Citation whether or not you file an answer.

5. You may have witnesses testify at the hearing. If you believe a witness will not appear voluntarily, you may request the Office of General Counsel to furnish you with a subpoena to compel his or her attendance. However, if the General Counsel's Office issues the subpoena the service of the subpoena upon the witness is your responsibility.

6. If you intend to request a postponement of the hearing, you must make application to the General Counsel of the Department.

The address of the General Counsel is:

a) For hearings scheduled to be held in New York City:

New York State Insurance Department
General Counsel
2 World Trade Center
New York, New York 10047
(212) 488-4150

b) For hearings scheduled to be held outside of New York City:

New York State Insurance Department
General Counsel
Agency Building One
Empire State Plaza
Albany, New York 12257
(518) 474-4553

7. A hearing in progress may be adjourned at your request, if you can give good reasons and support your request with written evidence, such as, for example, a letter from a doctor or a sworn statement (affidavit) that a witness will be unavailable on the date of the Hearing.

8. <u>If you do not appear or are not represented at the hearing, the hearing will take place as scheduled and a decision on the charges will be made. This decision may result in the revocation or suspension of your licenses and the denial</u>

of any pending applications.

9. If you do not appear at the hearing and a decision is made against you, the hearing may be reopened upon your written application, if you satisfy the presiding officer that there were valid reasons for your failure to appear or your failure to request an adjournment or postponement.

10. If you do appear at the hearing and a decision is made against you, the hearing may be reopened upon your written application to the presiding officer if you can show that there is newly discovered evidence or a compelling reason for such reopening.

11. The application to reopen a hearing must be made within six months from the date of the decision becoming effective.

12. Once a decision is made against you, you may, if you wish, take an appeal to the courts. This appeal must be made within four months from the date the deci-

sion becomes effective. It should be emphasized that your right to take an appeal is not connected in any way with your right to reopen a hearing as described in paragraphs 9, 10 and 11 and does not extend your time to take an appeal to the courts.

State of New York
Insurance Department
160 West Broadway
New York, New York 10013

James P. Corcoran
Superintendent of Insurance

STATE OF NEW YORK
INSURANCE DEPARTMENT

In the Matter of the Applications and/or Licenses of	
BRUCE S. HOROWITZ, individually and as sublicensee of OMNIBUS BROKERAGE, INC. and G. Thomas Cestaro, Respondents.	FINDINGS OF FACT, CONCLUSION AND DECISION

The above matter having come on for hearing on January 12, 23, 30, 31, February 6, 7, March 8, 19, 23, April 3 and May 14, 1984 at the office of the Insurance Department ("the Department") located in New York, New York, after the issuance of a Citation dated January 4, 1984, to show cause why all licenses issued to the respondents by the Department should not be suspended, denied or revoked on the

grounds that respondents have demonstrated their incompetency and/or untrustworthiness to act as insurance brokers and agents; and after the issuance of an Order of Summary Suspension of all licenses issued to respondents Bruce S. Horowitz and Omnibus Brokerage, Inc. ("Omnibus") by the Department; the proceeding having been commenced by due service of the Citation with Notice of Summary Suspension; and an Application to Vacate the Summary Suspension having been timely made, and a hearing of the Matter of Summary Suspension having been had after due notice to all; respondents having been represented by Friedlander, Gaines, Cohen, Rosenthal and Rosenberg, Sidney Gaines and Joseph A. Oster, Esqs. of counsel; the Department having appeared by Virginia D. Mallon, Esq.; and the determination having been made by the hearing officer after consideration of the record of the hearing;

and the Superintendent of Insurance having approved and adopted the determination, relief from summary suspension was denied by Order dated February 15, 1984. Thereupon the hearing having been resumed, respondent Horowitz appearing pro se, respondent Cestaro appearing and having been represented by Cestaro and Steller, Esqs.; the Department having appeared by Virginia D. Mallon, Esq.; and additional evidence having been placed on the record and additional testimony having been had; and the matter having been fully submitted and due deliberation having been had, the following findings of fact, conclusion and decision are made:

FINDINGS OF FACT

1. The Citation with Order of Summary Suspension and Notice of Hearing in the above entitled matter were duly served upon respondents on January 4, 1984 in accordance with Section 401 (3) of the

State Administrative Procedure Act, 11 NYCRR 31 (Department Regulation 94) and Sections 22, 23, 117 and 119 of the Insurance Law ("the Law").

2. Omnibus was duly licensed as an insurance broker pursuant to Section 119 of the Law by and through Bruce S. Horowitz; Bruce S. Horowitz was duly licensed as an insurance broker and agent pursuant to Sections 113 and 119 of the Law; G. Thomas Cestaro is duly licensed as an agent and broker pursuant to Sections 113 and 119 of the Law.

3. Horowitz was president of Omnibus. Cestaro supervised Omnibus' daily affairs, shared check-signing power with Horowitz and was on the Omnibus business premises every day, all day and frequently on Saturday as well.

4. Respondents acted as agent for the Universal Underwriters Insurance Company ("Universal") from May until early in

June, 1983, accepting premiums and applications for motorcycle insurance and issuing temporary I.D. Cards (form FS 21) to enable clients to obtain vehicle registration from the Motor Vehicle Bureau.

5. Universal furnished supplies to its agents, including temporary I. D.'s that were pre-imprinted with the insurer's name.

6. Respondents were required to promptly forward to the insurer both the application for insurance and the premium collected so that an insurance policy could be timely issued.

7. The respondents accepted application several occasions issued (and reissued) temporary I.D.'s but neglected to forward anything to Universal until the customers became involved in motorcycle accidents and claimed to be insureds through respondents.

8. Respondents used privately obtained

I.D.'s rather than Universal's authorized pre-imprinted cards and members of the public were apparently being misled into believing that an insurance policy was in force although no records had been forwarded to Universal. On or about June 7, 1983, the insurer terminated its relationship with respondents. In July respondents returned supplies that had been furnished by Universal.

9. Thereafter respondents sub-produced motorcycle insurance by agreement with David Cohen, owner of Sport Brokerage,Inc. Respondents used I.D. cards they purchased from a stationary supplier when they were without pre-imprinted cards, typing the name of the insurer on the cards.

CONCLUSION

The foregoing findings of fact resulted in the conclusion that relief from summary suspension was not warranted. The further development of the charges of the

Citation has not revealed facts such as to alter that conclusion, which is as follows:

Respondents admit that they have frequently issued store-bought I.D. cards, not authorized by the insurer. They assert that this was simply a matter of expedience and that they had no reason to seek authority to do so. They do not deny that in at least half a dozen instances their customer and the insurer did not learn that no policy had been issued on those temporary I.D.'s until the customers were involved in motorcycle accidents and the insurer denied coverage for lack of applications and premiums. In one such instance the customer was unable to use his automobile to conduct his business because of the pending traffic violation connected with apparent use of a motorcycle without insurance coverage.

There is nothing in the record to support the self-serving statement frequently

made in the course of the hearing that any wrong-doing by respondents could only be a thing of the past. A random sampling of respondents' records revealed that some applications and premiums were not forwarded to the insurer. At this juncture there may be hundreds of such non-covered drivers, totally unaware that they are not presently protected by a policy and permanent I.D. card. Having issued non-imprinted cards in the past with impunity and having failed to promptly forward applications and premiums to the insurer with impunity, respondents must be regarded as capable of presently accepting applications and premiums without timely forwarding them to the insurer.

Respondent Cestaro was charged with breach of fiduciary duty and with failure to notify the Department's Frauds Bureau of these wrongings of which, if he were not an active participant, he had full

knowledge. In denying these charges, Cestaro claimed that his presence at Omnibus was as a "troubleshooter" but was not connected with the insurance business conducted. I note that Cestaro sold his partnership interest in another insurance brokerage when he moved to Omnibus. He testified that he owns and is sub-licensee of two additional insurance businesses namely, Bargain Insurance Brokerage, Inc. and Creative Finance Network, Inc. In November, 1982, Cestaro loaned $100,000.00 to "Horowitz or any company he may own," to be repaid within five years. However Cestaro could not remember how he learned that Horowitz needed the money; he could not recall who made first contact. He did recall that at the time of making the loan to Horowitz he had not had contact with him for several years. The loan was evidenced only by a single paged loan agreement signed by Horowitz.

Diane Allain, who appeared as a witness for the Department on March 8, 1984, testified that she had worked as a clerk from September, 1982 until January 1984, for Harmony Brokerage, Inc. and then for Omnibus, its successor. She testified that Horowitz, as manager of Harmony, met with the employees the night before the changeover and told them that he and his partner would now run the new entity, Omnibus. She stated that Tom (Cestaro) said that he was the partner. Ms. Allain was asked detailed, probing questions on cross-examination. There was no doubt or hesitancy in her testimony; her demeanor impressed me as assured and confident.

On March 18, 1984, after a visit to her home by Cestaro, she testified that she could no longer recall the matters that were the subject of her testimony ten days earlier. Her confidence was entirely gone and her manner was one of confusion and

hesitancy. Considering the sequence of events, the witness' demeanor and the substance of her testimony, I am persuaded that Ms. Allain testified truthfully and with accurate recollection of the events she described, on March 8th.

Notwithstanding his protestations of minimal connection with the day to day business of Omnibus, I note Cestaro's involvement as follows: He had input into the hiring and firing of Omnibus personnel; he had authority to resolve problems and make on the spot decisions whether Horowitz was present or not, depending upon which of the two of them was more readily available when such problems arose; he was perceived by the employees to be a partner in the management of Omnibus' insurance business; he signed all kinds of checks, for payroll, operating accounts and premiums; when an employee, Mintz, asked Horowitz for a raise he was referred to Cestaro for

the determination; according to Ms. Kaplan, a witness who testified for respondents, Cestaro was the one who handled any complaints involving the Insurance Department; Cestaro, signing his correspondence as "Manager," replied to the Department concerning insurance matters.

There is substantial evidence in the record taken as a whole to support a finding that Cestaro was no mere trouble shooter, but in fact was an active participant in and maintained a supervisory posture regarding a substantial portion of the insurance affairs of Omnibus. The evidence reveals that Cestaro had apparent authority in the eyes of the employees and at least one insurer, Universal. He had actual authority regarding financial matters pursuant to his check-writing power and regarding insurance transactions with the Department. The credible evidence places Cestaro squarely at the center of

Omnibus' activities alongside its president, Horowitz. In this posture Cestaro knew or should have known of all the activities for which Horowitz' licenses have been suspended; he shares responsibility, if not for the acts of wrongdoing then for failing to report such acts, as would be expected of a trustworthy licensee of the Department.

DECISION

Therefore, pursuant to the provision of Section 117 and 119 of the Insurance Law, it is

ORDERED that all licenses issued by the Insurance Department to the respondents Bruce S. Horowitz, Omnibus Brokerage, Inc., and G. Thomas Cestaro and the same are hereby REVOKED, hereby DENIED; and it is further

ORDERED, that such revocation and denial of applications shall take effect ten (10) days after the mailing of a copy of this

decision to respondents by certified mail. The licenses of Horowitz and Omnibus remain suspended until the revocation takes effect.

Dated: New York, N. Y.
July 24, 1984

Elaine Berger
Hearing Officer

JAMES P. CORCORAN Superintendent of Insurance, pursuant to the authority vested in him under the Insurance Law, hereby approves and adopts the determination hereinabove made.

Dated: New York, N. Y.
July 24, 1984

JAMES P. CORCORAN
Superintendent of Ins.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 12, 1985

Present-Hon.
Leonard H. Sandler, Justice Presiding
Arnold L. Fein,
E. Leo Milonas,
Ernst H. Rosenberger,
Betty Weingberg Ellerin, Justices.

In the Matter of the Petition of THOMAS CESTARO, Petitioner, For an Order Pursuant to Article 78 of the CPLR, to Revoke, Annul and Modify the Order dated July 24, 1984	
-against-	25226
JAMES CORCORAN, as Superintendent of Insurance of the State of New York, Respondent.	

The above-named petitioner having moved at Special Term of the Supreme Court, New York County, pursuant to Article 78 of the Civil Practice Law and Rules, for a review by the court of a determination

of the respondent dated July 24, 1984,

And this proceeding having been transferred by order of said court, entered on October 9, 1984 (Martin Stetcher, J), to this Court for review and determination,

And said proceeding having duly come on to be heard before this Court and having been argued by Mr. Donald J. Steller of counsel for the petitioner, and by Mr. Myron Paul Schamis of Counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the determination of the respondent be and the same hereby is confirmed, without costs and without disbursements. The clerk is directed to enter judgment in favor of respondent, confirming the determination.

ENTER: HAROLD J. REYNOLDS
Clerk

1-10 Mo. No. 29
In the Matter of G. Thomas
Cestaro,

Appellant,

For an Order & c.,

James Corcoran, Superintendent
of Insurance of the State of
New York,

Respondent.

Motion for leave to appeal denied
with twenty dollars costs and
necessary reproduction disbursements.

DECISION COURT OF APPEALS FEB. 6 - 1986